

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )	
FOR CHANGE OF APPROPRIATION OF )	
WATER RIGHT NO. 41S 11321999 BY )	FINAL
DANIEL T & ROBERTA J FRENCH )	ORDER

\* \* \* \* \*

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the August 26, 2003, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

**ORDER**

Subject to the terms, conditions, restrictions, and limitations specified below, Authorization to Change Appropriation Water Right 41S 11321999 is hereby **GRANTED** to Daniel and Roberta French to change Water Right Nos. 41S 11321900, 41S 11322000, 41S 11322400, 41S 11322500.

Applicant is authorized to add a point of diversion in the NW<sup>1</sup>/<sub>4</sub>NE<sup>1</sup>/<sub>4</sub>SE<sup>1</sup>/<sub>4</sub> of Section 25, Township 14 North, Range 13 East, Judith Basin County, Montana to divert water to storage and remove stored water. Diversions in the amount of 8.76 cubic feet per second up to 338.25 acre-feet per annum to storage are limited to April 15 to October 31, inclusive, of each year.

Applicant is authorized to add a place of storage in the NW<sup>1</sup>/<sub>4</sub>NE<sup>1</sup>/<sub>4</sub>SE<sup>1</sup>/<sub>4</sub> of Section 25, Township 14 North, Range 13 East, Judith

Basin County, Montana. The onstream storage reservoir on Antelope Creek has a capacity of 21.25 acre-feet.

Applicant is authorized to change the place of use of 132 acres from Section 24, Township 14 North, Range 13 East, Judith Basin County, Montana, to 35.1 acres in the NE $\frac{1}{4}$ , and 74.2 acres in the NW $\frac{1}{4}$ , and 22.7 acres in the SW $\frac{1}{4}$ , for a total of 132 acres, all in Section 25, Township 14 North, Range 13 East, Judith Basin County, Montana. The changed place of use will be combined with existing 73 acres of irrigation to irrigate 205 acres with an irrigation pivot.

A. This authorization is limited to the amount of the historic use recognized by the Department in this proceeding as subject to change, and will thereafter not exceed that amount. If the historic use is reduced under adjudication proceedings pursuant to Title 85, Chapter 2, Part 2, MCA, this authorization will be limited to a lesser amount.

B. Applicant will remove the existing point of diversion from Antelope Creek located in SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 24, Township 14 North, Range 13 East, Judith Basin County, Montana which historically irrigated 132 acres located in E $\frac{1}{4}$  of Section 24, Township 14 North, Range 13 East.

C. Statements of Claim 41S 11321900, 41S 11322000, 41S 11322400, 41S 11322500 with Antelope Creek being their source and Statements of Claim 41S 11321200, 41S 11321400, 41S 11321500, 41S 11321800, 41S 11322200 with the Judith River being their source had overlapping places of use on the 210.5 acres in the E $\frac{1}{4}$  of Section 24, Township 14 North, Range 13 East. Of these 210.5 acres, Authorization to Change 41S 11321999 moved 132 acres to Section 25, Township 14 North, Range 13 East for the Antelope Creek rights only, effectively expanding the total irrigated acres under all the rights by 132.0 acres. The Judith River water rights place of use remained unchanged.

The appropriator shall not irrigate both of the 132.0 acre parcels in any given year with the water rights previously named. The appropriator shall notify the DNRC Water Resources Regional Office in writing with a map attached indicating which of the 132.0 acre parcels will be irrigated each year. When not irrigating the 132.0 acre parcel in Section 25, Township 14 North, Range 13, the place of use of the Antelope Creek rights may be adjusted to accommodate the function of the irrigation system. Such adjustments must be detailed on the map submitted with the notification. The notification of the place of use must be made by May 31 of each year. If no notification is made, it will be assumed that the 132.0 acres in Section 25, Township 14 North, Range 13, will be irrigated from Antelope Creek and the 132.0 acres lying primarily in the NE $\frac{1}{4}$  of Section 24, Township 14 North, Range 13, will not be irrigated from the Judith River.

D. Applicant must not impound water in their storage reservoir under this Application from August 1 through October 31, unless they have first contacted Appropriator Kelly French or his successors and obtained his consent based upon Kelly French or Kelly French's successor's need for stock water from Antelope Creek being satisfied.

E. Applicant shall install Department approved water use measuring devices at points approved by the Department above and below the upper dam and above and below the lower dam to be used to measure the flows in Antelope Creek entering and exiting each of the ponds. The appropriator shall keep written records of the flow rate of water measured at each of the four devices. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the Department or copies thereof, the appropriator shall keep a written weekly record of the flow rate of all water entering and exiting the ponds including the period of time at times water is flowing into the ponds. Records shall be submitted by November 30 of

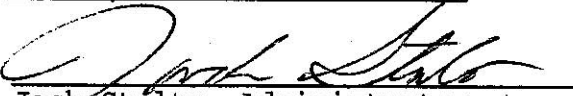
each year and upon more frequent request by the Department as necessary at other times during the year. *Failure to submit reports may be cause for revocation of a permit or change.* The records must be sent to the Lewistown Water Resources Regional Office. The appropriator shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.

**NOTICE**

The Department's Final Order may be appealed by a party in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of this Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the proceedings to the district court.

Dated this 24<sup>th</sup> day of SEPTEMBER, 2003.



Jack Stults, Administrator  
Water Resources Division  
Department of Natural  
Resources and Conservation  
PO Box 201601  
Helena, MT 59620-1601

**CERTIFICATE OF SERVICE**

THIS CERTIFIES THAT A TRUE AND CORRECT COPY OF THE FINAL ORDER WAS  
SERVED UPON ALL PARTIES LISTED BELOW ON THIS 24<sup>TH</sup> DAY OF SEPTEMBER,  
2003 BY FIRST CLASS UNITED STATES MAIL

DANIEL T & ROBERT J FRENCH  
AIRPORT ROAD  
HOBSON MT 59452

JOHN CHRISTENSEN  
PO DRAWER 549  
BILLINGS MT 59107-0849

ACKLEY LAKE WATER USERS ASSOCIATION  
UTICA ROUTE  
HOBSON MT 59452

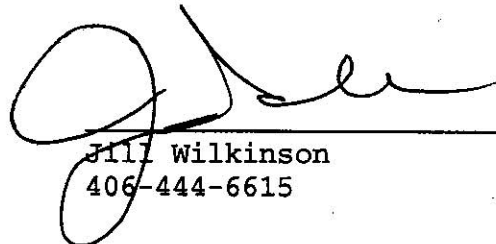
JOE WIGEN  
PO BOX 196  
HOBSON MT 59452

ROBERT J WIGEN  
610 COPPER COURT  
GREAT FALLS MT 59405

JIM HUBBLE  
ATTORNEY AT LAW  
PO BOX 556  
STANFORD MT 59479-0556

DNRC  
LEWISTOWN REGIONAL OFFICE  
613 NE MAIN  
SUITE E  
LEWISTOWN MT 59757-2020

DNRC  
CENTRAL OFFICE  
CURT MARTIN, BUREAU CHIEF  
CHARLES F BRASEN, HEARINGS EXAMINER  
1424 9<sup>TH</sup> AVE  
HELENA MT 59620-1602

  
\_\_\_\_\_  
Jill Wilkinson  
406-444-6615

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION FOR CHANGE )	PROPOSAL
OF APPROPRIATION OF WATER RIGHT NO. 41S )	FOR
11321999 BY DANIEL T & ROBERTA J FRENCH )	DECISION

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. § 85-2-307, a hearing was held on February 27, 2003, in Lewistown, Montana, to determine whether an authorization to change a water right should be issued to Daniel and Roberta French, hereinafter referred to as "Applicant" for the above application, under the criteria set forth in Mont. Code Ann. § 85-2-402(2).

APPEARANCES

Applicant appeared at the hearing by and through counsel David L. Pengelly. Dan and William French testified for the applicant. Objectors Jon Wigen, Charles Thomas, and Mark Wichman were called to testify by the Applicant. Objector Jon Wigen appeared and testified in his own behalf. Objector Ackley Lake Water Users Association (hereafter, ALWUA) appeared through Charles Thomas, President, and Mark Wichman, Vice-President.

EXHIBITS

Only the Applicant offered exhibits for the record. The exhibits are admitted into the record to the extent noted below.

Applicant offered five exhibits for the record. The Hearing Examiner accepted and admitted into evidence Applicant's Exhibits A1-A5.

**Applicant's Exhibit A1** is a one-page sketch of the dam and reservoir layout.

**Applicant's Exhibit A2** is a two-page document of Antelope Creek flow measurements taken by the Applicant.

**Applicant's Exhibit A3** is a copy of a table entitled "V-NOTCH WEIR CALIBRATION USING NEW PARAMENTERS."

**Applicant's Exhibit A4** consists of a photograph of "Antelope Creek at the county road to the south of French-looking south."

**Applicant's Exhibit A5** consists of a photograph of "Antelope Creek above the upper reservoir."

#### PRELIMINARY MATTERS

Prior to the hearing Objector Joseph Eve by and through counsel, Mark E. Westveer, withdrew his objection.

The Hearing Examiner decided in the February 21, 2003, Order to reserve ruling on the Motion to Dismiss Objections of Jon Wigen and Robert J. Wigen until after the hearing. At hearing it became apparent that these Objectors do have both upstream and downstream interests which may be effected by the proposed appropriation. The Hearings Examiner hereby **DENIES** Applicant's motions to Dismiss Objections of Jon Wigen and Robert J. Wigen.

Objector Robert J. Wigen did not appear at the hearing and is in default, and his objection is therefore dismissed. However, the information contained in the Objection remains a part of the record.

Prior to the hearing Objector Kelly and Jan French and Applicant entered into a separate private agreement. As a part of that private agreement (1) Applicant has agreed they will not impound water in their storage reservoir under this Application from August 1 through December 31, unless they have first contacted Objector Kelly French and obtained his consent (Kelly French has agreed not to unreasonably withhold his consent if he does not need Antelope Creek water for livestock watering purposes during this time period); (2) Applicant shall install measuring devices above and below the upper dam and above and below the lower dam to be used to measure the flows in Antelope Creek entering and exiting each of the ponds; and (3) By entering this stipulation, Objector Kelly and Jan French will withdraw their objection to this Application. Although the private agreement which the Applicant and Objector Kelly French can be enforced in court between the parties, it contains conditions which are not appropriate for placement on any authorization that may issue. See Finding of Fact No. 8 below.

At hearing the Hearing Examiner ruled that Objector ALWUA could



not be represented at hearing by its President and Vice-president. They were informed by the Hearing Examiner that corporations must be represented by counsel in administrative hearings. The Hearing Examiner informed the Association President, Charles Thomas, who is not an attorney, he could read or make a statement for the record, but could not cross-examine other witnesses, introduce witnesses on behalf of Objector ALWUA, make opening or closing statements, object to testimony or exhibits of other Parties, or otherwise act as counsel for Objector ALWUA. Objector ALWUA's President stated he believed the hearing was "invalid" because they had not been informed of this requirement in a timely manner and were allowed only limited participation without legal counsel. The record shows Objector ALWUA was mailed a copy of the "Hearings Information" on August 28, 2001. Therein it is stated on page three under the heading "Representation": "An attorney must represent cities, towns, organizations, companies, districts, and other groups." In regard to corporations and the practice of law, Montana case law leaves little doubt that corporations can appear in legal proceedings only through attorneys. Chief Justice Gray stated as follows in *Continental Realty, Inc. v. Gerry*, 251 Mont. 150, 152, 822 P.2d 1083, 1085 (1991):

Initially, we note an issue of importance which has not been raised by the appellants. Although the respondent was represented at trial by counsel, it appears on appeal solely through Charles Reed in his capacity as president of the corporation. **A corporation is a separate legal entity and cannot appear on its own behalf through an agent other than an attorney.** *Weaver v. Law Firm of Graybill, et al.* (1990), 246 Mont. 175, 803 P.2d 1089; Annotation, Propriety and Effect of Corporation's Appearance Pro Se, Through Agent Who Is Not Attorney, 19 A.L.R.3d 1073 (1968). Therefore, Mr. Reed cannot appear on behalf of the respondent corporation.

Objector ALWUA was informed by the Department eighteen months in advance of the hearing that they must be represented by an attorney. The ruling of the Hearing Examiner stands.

The record was left open for receipt of condition language worked out between the Applicant and the Lewistown Water Resources Regional Office regarding overlapping places of use. Such condition was mailed to the Parties April 21, 2003 and received by the Hearings Examiner



April 22, 2003. The record in this matter is now closed.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

#### **FINDINGS OF FACT**

##### **General**

1. Application for Change of Appropriation Water Right 41S 11321999 in the name of and signed by Daniel and Roberta French was filed with the Department on May 31, 2000.
2. The Environmental Assessment (EA) prepared by the Department for this application was reviewed and is included in the record of this proceeding.
3. Applicant seeks to add a point of diversion, add a new place of storage, and change a portion of the place of use for existing water right Nos. 41S 11321900, 41S 11322000, 41S 11322400, and 41S 11322500 in the amount of 8.76 cubic feet per second up to 338.25 acre-feet per annum. In the past water has been diverted from Antelope Creek for these rights at a point in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 25, Township 14 North, Range 13 East, and at a point in SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 24, Township 14 North, Range 13 East, all in Judith Basin County, Montana and in these amounts. Diversion has occurred from April 15 to October 31 with a maximum flow rate of 8.76 cubic feet per second (cfs) for irrigation of 338 acres in Sections 24 and 25, Township 14 North, Range 13 East, Judith Basin County, Montana. (Department file, testimony of Dan French, William French)
4. Applicant proposes to add a point of diversion in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 25, Township 14 North, Range 13 East, Judith Basin County, Montana. Applicant will remove one existing point of diversion located in SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 24, Township 14 North, Range 13 East, Judith Basin County, Montana. Diversions to storage will be April 15 to October 31. (Department file, testimony of Dan French)
5. Applicant proposes to change the place of use of 132 acres from Section 24, Township 14 North, Range 13 East, Judith Basin County,

Montana, to 35.1 acres in the NE $\frac{1}{4}$ , and 74.2 acres in the NW $\frac{1}{4}$ , and 22.7 acres in the SW $\frac{1}{4}$ , for a total of 132 acres, all in Section 25, Township 14 North, Range 13 East, Judith Basin County, Montana. The changed place of use will be combined with existing 73 acres of irrigation to irrigate 205 acres with an irrigation pivot. (Department file, testimony of Dan French)

6. Applicant proposes to add a place of storage in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 25, Township 14 North, Range 13 East, Judith Basin County, Montana. The storage reservoir on Antelope Creek has a capacity of 21.25 acre-feet (Department file, testimony of Dan French)

7. Historically Applicant flood irrigated place of use being changed often taking all of the flows of Antelope Creek except for early spring runoff events and extreme rainfall events. Spring runoff and extreme precipitation events would reach the downstream ALWUA canal. To determine the volume of water used in the past, Applicant relied upon the *Montana Irrigation Guide* for volume. The Application is not for salvaged water. (Department file)

#### **Adverse Effect**

8. Applicant's plan to add storage to regulate Antelope Creek flows and allow pumping to a center-pivot irrigation system will affect the flows in Antelope Creek below the reservoir at times the reservoir is not passing all inflow downstream. Downstream livestock needs and timing vary from year to year; therefore, it is not a matter of record. Objector Jan and Kelly French have stock water rights downstream of the proposed storage. Applicant and Objector French have agreed to a condition which will prevent adverse effect on Objector French's stock use. The condition is that Applicant will not impound water in their storage reservoir under this Application from August 1 through December 31, unless they have first contacted Objector Kelly French and obtained his consent. Objector Kelly French has agreed not to unreasonably withhold his consent if he does not need Antelope Creek water for livestock watering purposes during this time period. Applicant's existing right diversions are limited to April 15 through October 31 of each year and do not extend through December 31.

Diversions after October 31 are not a part of any existing right being

changed in this application and would be an expansion of the existing right being changed. Although the private agreement which the Applicant and Objector Kelly French can be enforced in court between the parties, it contains conditions which are not appropriate for placement on any authorization that may issue. The condition that Objector Kelly French will not unreasonably withhold his consent does not go towards showing one of the criteria are met. See Mont. Code Ann. § 85-2-402(8). Measuring devices must be installed in Antelope Creek upstream and downstream of the storage pond to show Applicant outflows match inflows at times water is not to be impounded. With these conditions there will be no adverse effect to Objector French's stock water rights and they will assure flows outside the historic period of diversion are not stored. The type of measuring devices and timing of the measurements are not included in the private agreement signed by the Applicant and Objector French. (Department file, testimony of Dan French)

9. Applicant's existing rights have historically been diverted between the periods of April 15, and October 31 of each year. Any diversion to storage outside these historic periods would be an increased burden to Antelope Creek. When diversion to storage is limited to the historic period of diversion there will be no adverse effect by an increased burden on Antelope Creek. (Department file)

10. Objectors Wigen claimed an adverse effect to their downstream stock water. The Ackley Lake Feeder Canal crosses Antelope Creek in the SW $\frac{1}{4}$  of Section 18, Township 14 North, Range 14 East and continues eastward to Objectors Wigen property. In the past the feeder canal collected any Antelope Creek water and conveyed it to Objectors Wigen. Objectors Wigen have claimed no water rights to Antelope Creek and do not own land that borders Antelope Creek. Objector ALWUA does not have a water right for Antelope Creek water. There is no adverse effect to existing rights of Objectors Wigen or Objector ALWUA because neither has shown they have existing water rights to Antelope Creek.

(Department file, testimony of Jon Wigen, Charles Thomas)

11. Objectors Wigen claim an adverse effect to their upstream irrigation claim. The last time the land associated to this claim was

irrigated out of Antelope Creek was in the early 1970's. This Hearings Examiner does not understand, nor did Objector adequately explain, how the upstream right could be adversely affected by proposed downstream changes. (Department file, testimony of Jon Wigen)

12. Applicant has irrigation water rights from the Judith River that have historically supplemented the place of use being changed in this project. Applicant and the Lewistown Water Resources Regional Office have agreed to a condition which will prevent added burden on the watershed by continued irrigation of both the old and new places of use. The condition requires the Applicant to notify the DNRC of the parcels to be irrigated each year or it will be assumed the Judith River rights will not be used on the historic place of use, so that if the 132 acres in Section 25, Township 14 North, Range 13 East, is being irrigated with Antelope Creek water, the 132 acres in Section 24, Township 14 North, Range 13 East, will not be irrigated using Judith River water. (Department file, *CONDITION AGREED UPON BY APPLICANT AND LEWISTOWN REGION OFFICE REGARDING OVERLAPPING ACRES*, received April 22, 2003 by the Hearing Examiner)

#### **Adequacy of Appropriation Works**

13. Applicant has constructed the dam and reservoir. The storage dam has an emergency spillway, a trickle overflow tube, and a drainage device. Objector ALWUA is concerned that there are no construction means to deal with water from a catastrophic failure of the reservoir, and Objector believes such an event could wash out their feeder canal where it intersects Antelope Creek downstream of the proposed reservoir. A portion of the proposed reservoir volume is located in the excavated portion of the reservoir storage. Thus, the full 21.25 acre-foot volume stored in the reservoir would not be released if the dam failed. The dam is located in excess of 1.5 miles upstream of the Ackley Lake Feeder Canal. The feeder canal often runs at capacity and has a concrete structure on the north side of the canal to let flows in excess of canal capacity overflow the canal without violating the integrity of the canal. The project involves the installation of a pump, ten inch PVC mainline, and 205 acre center pivot. The pivot was designed by a licensed engineering firm, Aquatech Irrigation of

Belgrade, Montana, to meet National Resources Conservation Service (NRCS) standards. The appropriation works are adequate. (Department file, testimony of Dan French, Charles Thomas)

#### **Beneficial Use**

14. Applicant intends to move 132 acres of flood irrigation to land that will be irrigated by a center pivot sprinkler system. Applicant has proven the proposed irrigation use of this stored water is a beneficial use of water. (Department file, testimony of Daniel French)

15. Applicant measured Antelope Creek flows above and below the storage reservoir during the fall of 2000 using V-Notch weirs. The borrow material taken from the reservoir and used to construct the dam contains clay material which helps prevent leakage through the dam and seepage from the bottom of the reservoir. These measurements show outflow from the reservoir match inflow to the reservoir. This indicates there is not excess seepage from the reservoir. The proposed storage will not waste water. (Department file, testimony of Dan French)

#### **Possessory Interest**

16. Applicant affirms they have a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use, and therefore, has proven they have a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (Department file)

#### **Water Quality Issues**

17. No valid objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permitholder to satisfy effluent limitations of his permit

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

### CONCLUSIONS OF LAW

1. The Department has jurisdiction to approve a change in appropriation right if the appropriator proves the criteria in Mont. Code Ann. § 85-2-402.
2. The Department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued; except for a lease authorization pursuant to Mont. Code Ann. § 85-2-436, a temporary change authorization for instream use to benefit the fishery resource pursuant to Mont. Code Ann. § 85-2-408, or water use pursuant to Mont. Code Ann. § 85-2-439 when authorization does not require appropriation works, the proposed means of diversion, construction and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; except for a lease authorization pursuant to Mont. Code Ann. § 85-2-436 or a temporary change authorization pursuant to Mont. Code Ann. § 85-2-408 or Mont. Code Ann. § 85-2-439 for instream flow to benefit the fishery resource, the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use; if the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely affected; and the ability of a discharge permit holder to satisfy effluent limitations of a permit will not be adversely affected. Mont. Code Ann. §§ 85-2-402(2)(a) through (g).
3. The Applicant has proven by a preponderance of evidence that the use of existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued will not be adversely affected when diversions to storage are limited to April 15 through October 31 of each year, streamflows immediately



above and immediately below the storage reservoir are measured, and downstream appropriator, Kelly and Jan French, are contacted when water is diverted to storage after August 1 of each year, and irrigation in the same year of the historic place of use by the Judith River water rights and the proposed place of use for the Antelope Creek irrigated acres in this application is not allowed. The condition requiring contact with downstream Objector French was modified to coincide with Applicant's period of appropriation for the right being changed. In a change proceeding, it must be emphasized that other appropriators have a vested right to have the stream conditions maintained substantially as they existed at the time of their appropriations. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727 (1908); Robert E. Beck, 2 Waters and Water Rights § 16.02(b) 1991 edition; W.Hutchins, Selected Problems in the Law of Water Rights in the West 378 (1942). Any increase in the period of appropriation is an enlargement of the right and requires a new appropriation. The condition agreed to by the Applicant and Objector French appears to extend the period of diversion beyond October 31 to December 31. The condition must be modified to eliminate appearance of enlarging the period of diversion. The type of measuring device to be installed needs to be one which is adequate to accurately measure the flows. Therefore, the measurement condition must be modified to incorporate Department approval of the type and placement of the measuring devices. Also, the timing of the measurements must be adequate to show water is not being impounded at times outside the period of appropriation or at times a call is made from a downstream appropriator. The record does not specify an appropriate measurement frequency. The Hearing Examiner sees this source as one which does not flow continuously and requires measurement on a weekly basis when water is flowing into the reservoir from Antelope Creek. Mont. Code Ann. § 85-2-402(2)(a). See Finding of Fact Nos. 7, 8, 9, 10, 11, 12.

4. The Applicant has proven by a preponderance of evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Mont. Code Ann. § 85-2-402(2)(b). See Finding of Fact Nos. 13.



5. The Applicant has proven by a preponderance of evidence the proposed use of water is a beneficial use of water as changed. Mont. Code Ann. § 85-2-402(2)(c). See Finding of Fact No. 14.

6. The Applicant has proven by a preponderance of evidence that the quantity of water proposed to be used is the reasonable amount necessary for the proposed beneficial use. Mont. Code Ann. § 85-2-402(2)(c). See Finding of Fact No. 15.

7. The Applicant has proven by a preponderance of evidence a possessory interest in the property where water is to be put to beneficial use. Mont. Code Ann. § 85-2-402(2)(d). See, Finding of Fact No. 16.

8. The application does not involve salvaged water. Mont. Code Ann. § 85-2-402(2)(e). See Finding of Fact No. 7.

9. No objection was raised as to the issue of water quality of a prior appropriator being adversely affected, or as to the ability of a discharge permit holder to satisfy effluent limitation of a permit. Mont. Code Ann. §§ 85-2-402(2)(f), (g). See, Finding of Fact No. 17.

10. The Department cannot grant an authorization to change a water right unless the Applicant proves all of the Mont. Code Ann. § 85-2-402 criteria by a preponderance of the evidence. Applicant has met, or there are conditions which can satisfy, the criteria for issuance of an authorization to change an appropriation water right. See Conclusion of Law No. 3 above. Mont. Code Ann. §§ 85-2-402(2), (8).

**WHEREFORE**, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

**PROPOSED ORDER**

Subject to the terms, conditions, restrictions, and limitations specified below, Authorization to Change Appropriation Water Right 41S 11321999 is hereby **GRANTED** to Daniel and Roberta French to change Water Right Nos. 41S 11321900, 41S 11322000, 41S 11322400, 41S 11322500.

Applicant is authorized to add a point of diversion in the NW¼NE¼SE¼ of Section 25, Township 14 North, Range 13 East, Judith Basin County, Montana to divert water to storage and remove stored

water. Diversions to storage are limited to April 15 to October 31, inclusive, of each year. (Department file, testimony of Dan French)

Applicant is authorized to add a place of storage in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 25, Township 14 North, Range 13 East, Judith Basin County, Montana. The onstream storage reservoir on Antelope Creek has a capacity of 21.25 acre-feet.

Applicant is authorized to change the place of use of 132 acres from Section 24, Township 14 North, Range 13 East, Judith Basin County, Montana, to 35.1 acres in the NE $\frac{1}{4}$ , and 74.2 acres in the NW $\frac{1}{4}$ , and 22.7 acres in the SW $\frac{1}{4}$ , for a total of 132 acres, all in Section 25, Township 14 North, Range 13 East, Judith Basin County, Montana. The changed place of use will be combined with existing 73 acres of irrigation to irrigate 205 acres with an irrigation pivot.

A. This authorization is limited to the amount of the historic use recognized by the Department in this proceeding as subject to change, and will thereafter not exceed that amount. If the historic use is reduced under adjudication proceedings pursuant to Title 85, Chapter 2, Part 2, MCA, this authorization will be limited to a lesser amount.

B. Applicant will remove the existing point of diversion from Antelope Creek located in SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 24, Township 14 North, Range 13 East, Judith Basin County, Montana which historically irrigated 132 acres located in E $\frac{1}{2}$  of Section 24, Township 14 North, Range 13 East.

C. Statements of Claim 41S 11321900, 41S 11322000, 41S 11322400, 41S 11322500 with Antelope Creek being their source and Statements of Claim 41S 11321200, 41S 11321400, 41S 11321500, 41S 11321800, 41S 11322200 with the Judith River being their source had overlapping places of use on the 210.5 acres in the E $\frac{1}{2}$  of Section 24, Township 14 North, Range 13 East. Of these 210.5 acres, Authorization to Change 41S 11321999 moved 132 acres to Section 25, Township 14 North, Range 13 East for the Antelope Creek rights only, effectively expanding the total irrigated acres under all the rights by 132.0 acres. The Judith River water rights place of use remained unchanged.

The appropriator shall not irrigate both of the 132.0 acre parcels in any given year with the water rights previously named. The

appropriator shall notify the DNRC Water Resources Regional Office in writing with a map attached indicating which of the 132.0 acre parcels will be irrigated each year. When not irrigating the 132.0 acre parcel in Section 25, Township 14 North, Range 13, the place of use of the Antelope Creek rights may be adjusted to accommodate the function of the irrigation system. Such adjustments must be detailed on the map submitted with the notification. The notification of the place of use must be made by May 31 of each year. If no notification is made, it will be assumed that the 132.0 acres in Section 25, Township 14 North, Range 13, will be irrigated from Antelope Creek and the 132.0 acres lying primarily in the NE¼ of Section 24, Township 14 North, Range 13, will not be irrigated from the Judith River.

D. Applicant must not impound water in their storage reservoir under this Application from August 1 through October 31, unless they have first contacted Appropriator Kelly French and obtained his consent based upon Kelly French or Kelly French's successor's need for stock water from Antelope Creek being satisfied.

E. Applicant shall install Department approved water use measuring devices at points approved by the Department above and below the upper dam and above and below the lower dam to be used to measure the flows in Antelope Creek entering and exiting each of the ponds. The appropriator shall keep written records of the flow rate of water measured at each of the four devices. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the Department or copies thereof, the appropriator shall keep a written weekly record of the flow rate of all water entering and exiting the ponds including the period of time at times water is flowing into the ponds. Records shall be submitted by November 30 of each year and upon more frequent request by the Department as necessary at other times during the year. *Failure to submit reports may be cause for revocation of a permit or change.* The records must be sent to the Lewistown Water Resources Regional Office. The appropriator shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.

**NOTICE**

This Proposal for Decision may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions and a supporting brief with the Hearing Examiner and request oral argument. Exceptions and briefs, and requests for oral argument must be filed with the Department by September 15, 2003, or postmarked by the same date, and copies mailed by that same date to all parties.

Parties may file responses and response briefs to any exception filed by another party. The responses and response briefs must be filed with the Department by October 6, 2003, or postmarked by the same date, and copies must be mailed by that same date to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the above time periods, and due consideration of *timely* oral argument requests, exceptions, responses, and briefs.

Dated this 26<sup>th</sup> day of August, 2003.



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Charles F Brasen  
Hearings Officer  
Water Resources Division  
Department of Natural Resources  
and Conservation  
PO Box 201601  
Helena, Montana 59620-1601

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the Proposal for Decision was served upon all parties listed below on this 26th day of August, 2003.

DANIEL T & ROBERTA J FRENCH  
AIRPORT ROAD  
HOBSON MT 59452

KELLY AND JAN FRENCH  
HCR 81 BOX 86  
HOBSON MT 59452

ACKLEY LAKE WATER USERS  
ASSOCIATION  
UTICA ROUTE  
HOBSON MT 59452

JON WIGEN  
PO BOX 196  
HOBSON MT 59452


ROBERT J WIGEN  
610 COPPER COURT  
GREAT FALLS MT 59405

TRENT C & GAYLE HUBER  
HC81 BOX 88  
HOBSON MT 59452

JOHN R. CHRISTENSEN  
PO DRAWER 849  
BILLINGS MT 59703  
Via fax: 406.248.3128

LEWISTOWN REGIONAL OFFICE  
613 NE MAIN SUITE E  
LEWISTOWN, MT 59457-2020

CURT MARTIN, CHIEF  
WATER RIGHTS BUREAU  
PO BOX 201601  
48 N LAST CHANCE GULCH  
HELENA MT 59620-1601

  
Jill Wilkinson  
Hearings Unit  
406-444-6615